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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS AYABAR,

Defendant and Appellant.

2d Crim. No. B207059
(Super. Ct. No. SA57527)
(Los Angeles County)

Appellant was convicted by jury of eight offenses that occurred on two separate occasions. From a shooting committed on July 10, 2005, the jury found appellant guilty of the first degree murders of Cesar Ivan Mendez and Antonia Cocolan Tovar (counts 1 & 2; Pen. Code, §§ 187, subd. (a), 189)¹ and the attempted murder of Ricardo Gonzalez (count 3; §§ 664, 187, subd. (a)). As to counts 1 and 2, the jury found true the special circumstances that appellant committed multiple murders to further the activities of a criminal street gang. (§ 190.2, subd. (a)(3) & (22).) As to counts 1-3, the jury found true personal and intentional firearm use allegations. (§ 12022.53, subds. (c), (d) & (e)(1)(A).)

Following a shooting on July 13, 2005, appellant was convicted of shooting at an inhabited dwelling (count 4; § 246), discharge of a firearm with gross negligence

¹ All further statutory references are to the Penal Code unless otherwise stated.

(count 5; § 246.3), possession of a firearm by a felon (count 7; § 12021, subd. (a)(1)) and two counts of shooting at an unoccupied vehicle (counts 6 & 8; 247, subd. (b)). The jury further found that all eight offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

The trial court sentenced appellant to life in prison without the possibility of parole on counts 1 and 2; it imposed a sentence of 40 years to life in prison on count 3; 15 years to life on count 4; and 1 year and 8 months each on counts 6 through 8. Count 5 was stayed pursuant to section 654. The sentences imposed on counts 2 through 8 were ordered to run consecutive to count 1. Appellant claims there was insufficient evidence to support the section 186.22, subdivision (b)(1) gang enhancements on counts 4 through 8. We affirm.

FACTS

Shootings Committed on July 10, 2005 - Culver City

Victims Cesar Mendez, Antonio Tovar and Ricardo Gonzalez were standing outside an apartment building at 5042 Slauson Avenue in Culver City. At about midnight, they saw appellant and another person walking towards them. Appellant approached Mendez. Gonzalez heard appellant ask Mendez if he was a gang member from Culver City. Gonzalez thought appellant said "barrio" and "cholo," words associated with gangs. Mendez replied, "no" and said that Gonzalez was his cousin. None of the victims were gang members.

Appellant was wearing a black hooded jacket with a black baseball cap that displayed the letter "A." He pulled down his hood with one hand to reveal his cap, and pulled out a gun with the other hand. He began to fire at all three men. Mendez and Tovar were fatally shot. Appellant fired multiple shots at Gonzalez, who fled to an apartment building where his aunt lived. He saw another man near a parked car who was also shooting. Gonzalez crawled up the stairway as the shooting continued. He heard the shooters yelling, "Kill him. Kill him. Do not let him go." Gonzalez crawled into an open doorway and discovered he had been shot in the arm, leg and lower stomach. The shooters fled.

Autopsies showed that Mendez had been shot nine times and Tovar had five gunshot wounds. Two bullets removed from Mendez's body were fired from a Beretta handgun recovered from the shooting. Gonzalez described appellant to police several hours after the shooting. He later identified appellant from a photographic line-up, at jail, and at trial.

Shootings Committed on July 13, 2005 – Baldwin Hills

On July 13, 2005 at approximately midnight, Hanna Tewold and her cousin were inside their apartment at 3930 Nicolet Avenue in Baldwin Hills. A bullet came through the window frame in the bedroom, hit the ceiling and landed on the floor. Tewold opened her window, saw a police officer standing outside, and gave him the bullet fragment. Gunshots had been fired at two cars parked below Tewold's apartment. Martha Patino lived near Nicolet Avenue. She, too, heard gunshots shortly before midnight. She called 911, then looked out the window to see a white truck with tinted windows drive quickly away.

Los Angeles Police Officer Sara Jaramillo was working as an observer in a police department helicopter. She heard a radio broadcast describing a shooting at Nicolet Avenue. She looked down and saw a white truck with an extra cab and tinted windows driving northbound a short distance from Nicolet Avenue. It pulled up to the curb and she saw something thrown from the front passenger window. The truck pulled away, stopped again, and three Hispanic men ran from the truck.

Jaramillo described the driver (appellant) as having a shaved head and wearing a gray sweatshirt and pants. Two of the men tried to run inside nearby houses. The driver ran around an apartment building and disappeared. Jaramillo directed officers to the 4900 block of Ferndale. An officer who responded to the scene saw movement in the bushes near a house on 4970 Ferndale. He ordered the person out and detained him. Jaramillo recognized him as the driver.

Another officer responded to Westhaven Avenue, where the driver had been seen throwing something from the car window. The officer found three guns on the yard in front of 4811 Westhaven: a black nine-millimeter handgun; a nine-millimeter

Beretta; and a .357 Magnum revolver. A third officer found a trail of 16 nine-millimeter casings at the scene of the shooting on Nicolet.

A firearms analyst testified at trial that two of the firearms recovered from the front yard of 4811 Westhaven were used in both the July 10 and July 13 shootings. Appellant's palm print was lifted from the outside of the white truck. Two .38-caliber rounds were on the front seat and a third was on the floorboard of the truck.

Gang Expert Testimony

For the section 186.22, subdivision (b)(1), gang enhancement to apply, the prosecution must prove that the crime for which the defendant was convicted was committed for the benefit of, at the direction of, or in association with any criminal street gang, and with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

The prosecution's gang expert, police officer Winston Lee, testified that he has daily contact with the 18th Street gang members. The gang is made up of several "clicques," one of which is the Alsace clique, whose territory is bordered by Interstate 10, La Cienega, La Brea and Jefferson. Their gang graffiti can be seen in the area. The Alsace clique has approximately 100 members whose function is to be "shot callers," "shooters," and "robbery crews." They are the clique most commonly involved in shootings. The shot callers give orders to "lieutenants" who direct "soldiers" to carry them out. Committing crimes for the gang is a way to show one's allegiance and gain status within the gang.

Lee testified that the primary activities of the 18th Street gang are murders, robberies, burglaries and transporting narcotics. The gang members typically have tattoos to indicate the number 18. Among them are tattoos of the letter "E" (for eighteen), "18er," and the number 6, repeated three times. "ALS" refers to the Alsace clique. Its members often wear Atlanta Braves or Angels hats because they bear the letter "A" for Alsace.

The Culver City Boys gang and the Black P Stone gang are both rivals of the 18th Street gang. The Slauson area, where the July 10, 2005 shooting occurred, is in

the Culver City Boys gang territory. The address of 3930 Nicolet in Baldwin Hills is in the heart of Black P Stone territory.

Lee testified that he had encountered appellant several times before the July shootings. Appellant admitted that he was a gang member belonging to Alsace and that his moniker was "Pork Chops." He had the number "18" tattooed on his face and the tattoos "E" and "XVIII" on his body. It was Lee's opinion that appellant was an active member and shooter for the 18th Street gang.

One month after the shootings, appellant's house was searched pursuant to a search warrant. Officers found a cigar box containing appellant's green card with his photograph and items identifying him as a member of the ALS clique. In response to a hypothetical question concerning the July 10, 2005 shooting in Culver City, Lee believed that, if appellant were to approach a victim, ask if he was from the Culver City Barrio, pull off his hood to reveal a hat with the letter "A," and shoot the victims, such a shooting would benefit the 18th Street gang.

The prosecutor posed another hypothetical regarding the July 13, 2005 shooting in Baldwin Hills. Lee was asked to assume that appellant and some friends had entered Black P Stones territory. Appellant was driving a white truck and stopped in front of 3930 Nicolet. Appellant and the two other individuals pulled out their guns, shot indiscriminately, then returned to the truck. They drove a short distance, stopped and fled.

Lee testified that such a shooting would benefit the 18th Street gang because its members had ventured into the territory of its rival, Black P Stones. The act would demonstrate that the 18th Street gang should be feared. The gang could accomplish its objective of instilling fear in the community without yelling out gang slogans, leaving graffiti or identifying themselves as 18th Street gang members.

DISCUSSION

Appellant does not challenge the sufficiency of the evidence supporting the gang enhancements arising from the July 10, 2005 shooting. Rather, he claims the evidence does not support the gang enhancements imposed in counts 4-8, following the

July 13, 2005 shootings. Appellant asserts that there was no evidence that the buildings and cars fired upon had any connection to a gang. The perpetrators did not utter gang slogans, display gang symbols or wear gang attire.

When addressing a challenge to the sufficiency of the evidence, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) This standard applies to gang enhancement findings. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

"In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) An expert may give opinions regarding the knowledge and intent of a hypothetical gang member. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946-947, fn. 3.) His testimony may include matters such as gang attire and tattoos, the manner in which a gang functions, its territory, membership and primary activities. (*People v. Kellebrew* (2002) 103 Cal.App.4th 644, 656-657.) The expert may explain the gang's motivation for committing criminal offenses and describe how they benefit the gang or promote gang rivalries. (*Id.* at p. 657.) "[A] trier of fact may rely on expert testimony about gang culture and habits to reach a finding on a gang allegation." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

The July 13, 2005, offense cannot be characterized as a random shooting. Appellant is an admitted member of the 18th Street gang and operates within the smaller Alsace clique that is regularly involved in shootings. According to the gang expert, entering rival gang territory and shooting indiscriminately at unoccupied cars and inhabited dwellings would enhance the status of the 18th Street gang by instilling fear in the community. Such an act would benefit the shooter personally by elevating his status within his own gang. The jury could rely on the gang expert's testimony to this effect.

(*People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1047-1048.) Moreover, two of the firearms used in the Baldwin Hills shooting had also been used in the fatal gang shooting three days earlier.

From these facts the jury could reasonably conclude that the shooting was gang-related. Substantial evidence supports the jury's determination that the crimes were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1).)

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Cynthia Ravis, Judge
Superior Court County of Los Angeles

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C.
Johnson, Supervising Deputy Attorney General, Elaine F. Tumonis, Deputy Attorney
General, for Plaintiff and Respondent.